

WORKERS' COMPENSATION & EMPLOYER LIABILITY QUARTERLY

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COMPENSATION DENIED WHERE CLAIMANT'S HEART CONDITION HAD DETERIORATED SO THAT THE ATTACK COULD HAVE BEEN PRODUCED BY NORMAL DAILY ACTIVITY

In our October, 2002 Newsletter, we described the *Sisbro* case as having landmark status. In *Sisbro*, the claimant alleged that a degenerative condition in his right foot related to his diabetic condition had been aggravated when he twisted his ankle while disembarking from a truck and stepping into a pothole. The medical testimony indicated that anything, even normal walking, could cause the degeneration described. The appellate court determined that the normal daily activity exception applied where the evidence showed that any normal daily activity would be an overexertion because of the prior medical situation.

The recent case of *Twice Over Clean, Inc. v. Industrial Commission* found that a heart attack was not compensable because of the principle cited in *Sisbro*. On January 2, 1997, Howard Haulk was working as a laborer removing asbestos from an old, disused building. The claimant worked from about 7:00 a.m. to about 4:30 p.m. where the inside temperature was about five degrees Fahrenheit and colder than the outside temperature of about 15 to 20 degrees Fahrenheit. The claimant had been placing the removed asbestos into large bags, each of which weighed about 40 to 45 pounds. About 500 bags had to be placed into a commercial dumpster which was accessed by walking down several stories and across 40 or 50 feet outside of the building. While performing this clean-up of the building, the claimant wore a full respirator and protective clothing.

About 2:30 p.m., the claimant noted pains in his chest, neck and left shoulder and when the pains became more intense, he sat down for a few minutes

until the pains abated sufficiently to permit him to continue working. The work was being performed in Minneapolis and when the claimant returned to his hotel, he did not feel like eating dinner. At about 7:30 p.m., the pains became more intense, at which time the claimant was taken to a local hospital where he was diagnosed as having an acute inferior wall myocardial infarction.

After his discharge from the Minneapolis hospital, the claimant returned to Peoria where he came under the care of Dr. Cohen, his family physician. Dr. Cohen testified that, based on the history related by claimant, the myocardial infarction was caused by the physical activity in which he was engaged on January 2, 1997. He admitted that the claimant's right coronary artery was 90% occluded and that any activity or no activity could put sufficient stress on the heart to result in a myocardial infarction and that a person with a 90% occlusion, "is basically a heart attack waiting to happen." Dr. Wilner, a cardiologist retained by the employer, stated that the claimant's work activities did not cause the infarction.

In reviewing the medical testimony, the court emphasized:

Dr. Cohen's testimony establishes that claimant's heart condition was so far gone that any stress, even that of ordinary daily activity, could have brought about claimant's heart attack. As a result, therefore, claimant is barred from recovery under the Act.

The claimant argued that the Commission's factual determination of causation was entitled to deference and that the appellate court should not substitute its judgment for that of the Commission. The court stated:

While claimant correctly states the law, he overlooks the fact that the Commission did not employ the proper legal analysis to the questions at hand. The Commission failed to consider the normal daily activity exception to the rule that the employer must take the employee as it finds him.

The claimant then argued that the court was ignoring the decision in *Baggett v. Industrial Commission*, which had set forth the standard of review in cases of prior physical deterioration. In *Baggett*, the court stated:

An accidental injury can be found to have occurred, even though the result would not have obtained had the employee been in normal health. If an employee's existing physical structure gives way under the stress of his usual

labor, his death is an accident which arises out of his employment. To come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury.

The mere fact that an employee might have suffered a fatal heart attack, even if not working, is immaterial, for the question before the Commission is whether the work that was performed constituted a causal factor. The sole limitation to the above general rule is that where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied.

The court, in the instant case, differentiated *Baggett* by saying:

In Baggett, however, there was no issue as to whether either of the exceptions to the general rule applied. There was no issue that the claimant's health was so deteriorated that even normal daily activity was an overexertion. Here, by contrast, claimant's own physician agreed that claimant was a heart attack waiting to happen and that claimant could have suffered a heart attack even while at rest. Thus, while Baggett provides an accurate statement of the law regarding the normal daily activity exception to the general rule that an employer must take its employee as it finds him, it does not apply that rule. As a result, Baggett is inapposite to the facts of this case.

In a special concurring opinion, Justice Holdridge indicated an agreement with the decision despite the fact that he had dissented from *Sisbro*. He agreed with the causation exception in the instant case because the claimant's doctor showed that the exception was applicable. Justice Goldenhersh, as might be anticipated, dissented.

EDITOR'S NOTE: The *Sisbro* and the *Twice Over Clean* cases are important to the defense of claims based on aggravations of prior conditions particularly when the circumstances of the accident are less than dramatic. If the injury results from normal daily activity, it amounts to an exception to the general rule that an employer must take its employee as it finds him.

EMPLOYER DOES NOT "PROVIDE"

PARKING BY MERELY REIMBURSING EMPLOYEE FOR PARKING EXPENSE

In *Jean Joiner v. Industrial Commission*, the claimant was employed as a deputy clerk at the Will County Courthouse in Joliet, Illinois. No free parking site was available to employees at the courthouse. The county also owned an office building several blocks away and county employees were able to park without charge in a lot adjacent to the office building.

By virtue of a collective bargaining agreement, the county was to reimburse the employees for parking costs at a specified monthly rate. Within one block of the courthouse was a public parking facility, commonly referred to as the "Chicago Street Lot." This parking lot was neither owned nor maintained by the county. The lot was open to the general public on a monthly or daily fee basis and while used regularly by courthouse employees, was also available to the general public.

Ms. Joiner normally took public transportation to work, but in December, 1999, she was injured in an unrelated accident and began receiving a ride to work from a co-worker, Lee Chess. Chess regularly parked in the Chicago Street Lot and obtained reimbursement from the county for her monthly parking fees, pursuant to the collective bargaining agreement.

On February 23, 2000, after the claimant left work in the courthouse at 4:30 p.m., she was walking across the Chicago Street Lot on her way to Chess's vehicle when she slid on loose gravel, fell into a pothole and fractured her right patella. The arbitrator denied compensation and this finding was affirmed by the Commission. The "general premises rule" provides that when an employee sustains an injury off the employer's premises while traveling to and from work, the resulting injuries do not arise out of and in the course of the employment. Two exceptions to the general premises rule have developed. One, recovery has been permitted for off-premises injuries when "the employee's presence at the place where the accident occurred was required in the performance of his duties." Two, recovery has been permitted for injuries sustained by an employee in a parking lot "provided by" the employer. The employee contended that she was covered by the second exception. She asserted that the county had "provided" parking for employees in the Chicago Street Lot through the application of the reimbursement provision in the collective bargaining agreement. The court disagreed, stating:

As a factual matter, nothing in this record supports the conclusion that the Clerk provided parking for her employees at the Chicago Street Lot where the claimant was injured. It is uncontradicted that the Clerk did not: own, operate or maintain the parking lot; lease any parking spaces therein for use by her employees; assign any parking spaces in the lot for use by her employees; tell any of her employees to park in that lot, or any other parking lot for that matter; or enter into any agreement with the lot's owner regarding the parking fees that her employees would be charged. The flaw in the claimant's reasoning is her attempt to equate providing reimbursement for parking expenses with providing the parking facility itself.

EDITOR'S NOTE: The claimant was unable to establish that the injuries suffered by the claimant fell within either exception to the general premises rule. As the court stated, reimbursement for parking expenses does not equate with providing the parking facility itself.

MERE ACCEPTANCE OF UNSOLICITED WORKERS' COMPENSATION BENEFITS DID NOT PREVENT EMPLOYEE FROM PURSUING A CIVIL CLAIM AGAINST THE EMPLOYER

On September 27, 1998, the Reddick Community Fire Protection District responded to a brush fire. Soon after arriving, one of the fire trucks left to replenish its water supply. William Mikeska drove the truck while Lisa Wren and Kathy Foiles, both firefighters, stood on the running boards along the sides of the truck. As a result of the fire truck's collision with a car driven by Lucretia Moulton, both Wren and Foiles sustained injuries. Without being requested to do so, Liberty Mutual, the District's workers' compensation insurance carrier, paid \$33,974.37 for medical expense incurred by Wren and \$49,344.18 for the medical expenses incurred by Foiles. In addition, Foiles received TTD payments for 64-5/7 weeks, a total of \$9,568.68.

Within six months, Wren and Foiles had filed civil suits against the Fire District, Mikeska and Moulton. Both also filed workers' compensation claims shortly before the three-year limitations period had expired.

The District moved for summary judgement on the basis of the exclusive remedy provision of the

Workers' Compensation Act. The plaintiffs argued that they were not precluded from filing suit, despite having accepted workers' compensation benefits, because they were not employees of the District. In other words, the exclusive remedy provision of the Act should not apply to one not subject to the Act.

The trial court found for the District and granted the motion for summary judgment. The court agreed that a dispute as to the employment may have existed because neither plaintiff received any compensation for services but felt that the plaintiffs had applied for and had received benefits and had never returned them.

The appellate court reversed stating that the summary judgment was not appropriate because of the factual dispute as to the employment and the alleged application for benefits. The court noted that no single fact controls the existence or non-existence of an employment relationship. With reference to the court's reasoning, several important guidelines can be found:

1. THE MERE ACCEPTANCE OF THE PAYMENT OF MEDICAL AND TTD BENEFITS DOES NOT BAR A CIVIL ACTION AGAINST THE EMPLOYER.

The Copass court held that plaintiff's receipt of benefits did not bar her wrongful death action, stating:

We hold the uninitiated payments plaintiff accepted from Illinois Power are not sufficient to constitute her election to the benefits provided by the Act. Simply accepting voluntary payments from Illinois Power, without taking any affirmative action before the Commission, is not a clear and unequivocal act evidencing an assertion that the death is compensable under the Act. To hold otherwise would allow employers to send payments to injured parties or bereaved families, characterize the payments as workers' compensation benefits, and terminate any option the employee or family might have to avoid the exclusivity-of-remedy rule under the Act.

Similarly in this case, the benefits received by the plaintiffs in the form of payment of medical bills and TTD payments were made voluntarily by the District's insurance carrier. Foiles filed an affidavit averring that neither she nor her attorney had solicited or requested the benefits she received. Wren likewise testified at her deposition that she had not requested payment of her medical bills. Under such circumstances, we believe that mere acceptance of

the unsolicited benefits offered by the District was insufficient to bar plaintiffs' common law claims.

2. THE FILING OF THE APPLICATION WITH THE INDUSTRIAL COMMISSION DID NOT DEPRIVE THE PLAINTIFFS OF THE RIGHT TO SUE.

Moreover, we do not believe that plaintiffs have foregone their right to sue by filing workers' compensation claims in 2001. In Rhodes our supreme court stated that while a person may not recover payment from an employer by means of both a workers' compensation claim and a common law action, "there is nothing to prevent a cautious employee who has a pending workmen's compensation claim from also filing a common law action, if he is uncertain of his grounds for recovery, so as to toll the statute of limitations." Conversely, we believe that nothing should prohibit a cautious plaintiff with a pending lawsuit from also filing a workers' compensation claim to avoid the bar of the statute of limitations. That is precisely what plaintiffs did in this case.

3. A NON-EMPLOYEE WHO APPLIES FOR AND COLLECTS BENEFITS UNDER THE ACT MAY BE PRECLUDED FROM FILING A CIVIL ACTION.

The court pointed out that the collection of benefits under the Act is more significant than the actual employment status of the plaintiff, stating:

*In Collier the court stated that "where an employee *** has collected compensation on the basis that his injuries were compensable under the act, the injured employee cannot then allege that those injuries fall outside the act's provisions. We base this conclusion not only upon a fear of double recovery [citation], but also upon our desire to prevent the proliferation of litigation."*

In other words, applying for and accepting benefits under the Act does not transform a nonemployee into an employee. Instead it acts as a form of estoppel, denying a plaintiff who has availed herself of the benefits of the Act from thereafter asserting that she falls outside its reach.

4. THE COURT CONCLUDES:

Nevertheless, "the voluntary acceptance of workers' compensation payments, without any affirmative act to seek those benefits, does not necessarily operate to bar the recovery of civil damages against the employer or coemployee."

EDITOR'S NOTE: The court has stated that the mere filing of an Application with the Industrial Commission is not sufficient to preclude a civil claim if the claim is filed to avoid the limitations defense. What if that Industrial Commission Application had been filed immediately after the accident and before any medical or TTD benefits were paid. Would this be considered an affirmative request for Industrial Commission benefits?

The District may have been in a quandary when this case arose. It apparently relied on the *Creve Ceour* case which held that volunteer firefighters are employees of the municipality they serve. If the District chose to deny compensation on the basis that the volunteer firefighters were not paid, then it could possibly be faced with a claim for penalties. The court has suggested that the employer could take advantage of an alleged employee by paying compensation to eliminate a civil case against the employer. In this case, the firefighters could easily have returned the benefits to the District if the benefits were being improperly paid.

CLAIMANT RESPONDING TO JURY SUMMONS HELD NOT TO BE AN EMPLOYEE OF THE JURY COMMISSION

Claimant, Linda Jaskoviak, received a jury summons and reported to the Will County Jury Commission as directed. She later received a \$7.00 check from the Commission. On her questionnaire, claimant indicated her occupation was teacher and identified the school district as her employer. On June 13, 1994, while being escorted with a group of jurors to a jury holding area, the claimant lost her footing on a stairway and sustained a fractured ankle.

Section 1(b)(1) of the Workers' Compensation Act defines the term "employee" as follows:

Every person in the service of the State, including members of the General Assembly, members of the Commerce Commission, and

*all persons in the service of the University of Illinois, county, including deputy sheriffs and assistant state's attorneys, *** whether by election, under appointment or contract of hire, express or implied, oral or written ***.*

The claimant contended that she qualified as a "person in the service of the State," that she was appointed as such when she received the jury summons and that she was paid "compensation" when she received the \$7.00 payment. The court disagreed and found that the claim was not compensable, stating:

1. *Jurors are not elected, appointed, or contracted to work for the State or county. Illinois courts have stated that, absent a contract for hire, either express or implied, there can be no liability under the Act.*
2. *The appointment also required mutual assent, as persons are not appointed to office without first agreeing to serve in that capacity. A jury summons is not the equivalent of an appointment to office. The jury commission prepares jury lists for the court, and it is the court that issues the summons. A summons is a writ or process requiring an identified person to appear in court. A summons for jury duty is neither an appointment to office nor a contract for hire.*
3. *The nature of the office of juror is a constitutionally created civic obligation to be fulfilled by citizens of Illinois. The fact that jurors are paid a per diem fee and travel expenses does not change the nature of juror's civic obligation.*
4. *In this case there was no employment agreement evidenced by an offer on the part of the county or state to employ claimant and no acceptance by claimant. Claimant had no choice to accept or decline jury duty, and issuing a jury summons is not an "offer." Claimant concedes that, in Illinois, an employment relationship is a product of mutual assent and notes that she did not agree to be a juror.*

One Justice dissented and disagreed with the majority of states which deny workers' compensation coverage to jurors for injury while serving jury duty. He also emphasized that our own statute did not specifically exclude jurors and defines an employee in broad terms.

EDITOR'S NOTE: While this case does not apply to a large class of claimants, it does address a number of interesting questions of law.

GOVERNOR MAKES COMMISSION APPOINTMENTS

On Friday, February 21, 2003, Governor Rod Blagojevich appointed Dennis R. Ruth as Chairman of the Industrial Commission. Chairman Ruth served as an arbitrator since May 15, 2001, handling the calls in Carlinville, Carlyle, Collinsville, and Mt. Vernon. Before coming to the Industrial Commission, he worked as an attorney specializing in workers' compensation.

Governor Blagojevich also reappointed Commissioner Jacqueline A. Kinnaman to her position as an employee representative on the Commission. Commissioner Kinnaman was first appointed to the Commission in 1990.

The appointments required the consent of the Senate. Both terms will run until January, 2007.

TRIALS GET PRIORITY

Chairman Ruth has established the following policies for arbitration:

1. Parties present and ready for trial shall be given priority over parties either not ready or those requesting pre-trials.
2. Parties will not be required by Arbitrators to submit to pre-trials.
3. Parties who request a pre-trial will be given an opportunity for a pre-trial after trials have concluded.
4. All additional rules or requirements of arbitrators, as a condition to obtaining a trial, that are inconsistent with the mandate of Section 16 that procedures be simple and summary, shall be immediately discontinued.

In addition, Chairman Ruth has also ordered that Arbitrators will not continue cases based on Respondent's request to continue a case in order to schedule an IME.

ARBITRATION REASSIGNMENTS

AND SCHEDULE CHANGES

Effective July 1, 2003, the following arbitrators are assigned full-time to the following territories: Tony Erbacci - Waukegan and Woodstock; Joann Fratianni - Geneva; Leo Hennessy - Joliet and Kankakee; Ray Rybacki - Wheaton.

Also effective July 1, 2003, the following arbitrators are assigned full-time to the Chicago IIC office: Peter Akemann, Brian Cronin, Robert Falcioni and David Kane.

FRANK J. WIEDNER
Editor